No. 83-1201

In the Supreme Court of the United States

OCTOBER TERM, 1983

TODD SHIPYARDS CORPORATION AND
FIREMAN'S FUND INSURANCE CO., PETITIONERS
v.
GERALD L. BLACK AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, for purposes of determining the average weekly wage upon which an employee's compensation is based under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.*, the time of the employee's injury is the time at which the employee's occupational disease manifests itself.

2. Whether the last covered employer to expose an employee to injurious stimuli contributing to an occupational disease is liable for the full amount of the employee's LHWCA compensation benefits.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A54) is reported at 717 F.2d 1280. The decision of the Benefits Review Board (Pet. App. E1-E25) is reported at 13 Ben. Rev. Bd. Serv. (MB) 682. The decision of the administrative law judge (Pet. App. D1-D16) is reported at 11 Ben. Rev. Bd. Serv. (MB) 60.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1983, and a petition for rehearing was denied on October 20, 1983 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(2), 903(a) and 910, are set out at Pet. App. G1, G3, G4.

STATEMENT

1. The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.*, provides that maritime employers must pay benefits to certain employees and their survivors in compensation for disability or death resulting from a covered injury (33 U.S.C. 903(a)). An "injury" encompasses "such occupational disease or infection as arises naturally out of such employment" (33 U.S.C. 902(2)). Compensation rates are based on "the average weekly wage of the injured employee at the time of the injury" (33 U.S.C. 910).

2. Respondent Gerald L. Black was employed by petitioner Todd Shipyards Corporation as a welder from 1942 through 1945 (Pet. App. A3, E2, D2). In the course of his employment, Black was exposed to high concentrations of asbestos in confined areas; according to his uncontroverted testimony, Black had to "wallow" in asbestos to do his welding, and the substance was literally thrown about "like snowballs" (*id.* at A3-A4, E2, D2-D3). Suffering from vomiting and weight loss, Black heeded his doctor's advice and terminated his employment with petitioner Todd Shipyards in 1945 (*id.* at A4, D3). Black then worked at various outdoor jobs and was hired by Boeing Aircraft Corporation, a non-maritime employer, in 1951 (*id.* at A4, E2-E3, D3). He remained there until forced to resign because of ill health in May 1977 (*id.* at A4, E3, D3). Black was exposed to asbestos "off and on" during his employment with Boeing, but the concentration was less than during his tenure at petitioner Todd Shipyards (*id.* at A5, D3-D4).

In May 1977, the right upper lobe of Black's lung was removed because of a squamous cell carcinoma. Several months thereafter, in December 1977, Black learned that he was suffering from asbestosis caused by his occupational exposure to asbestos (Pet. App. A5, D4).

3. Black filed a claim for LHWCA compensation against petitioners, Todd Shipyards and its insurer, Fireman's Fund Insurance Company (Pet. App. A5-A6).[1] The parties agreed that Black was permanently and totally disabled by the lung carcinoma at the termination of his employment with Boeing in 1977. Petitioners disputed their liability, however, maintaining that petitioner Todd Shipyards was not the last employer to expose Black to injurious stimuli. They further asserted that, even if Todd was liable, the compensation rate should be calculated on the basis of Black's average weekly wage in 1945.

After a hearing, an administrative law judge (ALJ) ruled in Black's favor on all issues (Pet. App. D8, D12, D13-D14). The ALJ found that Black's industrial exposure to asbestos while employed by petitioner Todd Shipyards had "resulted in * * * pathological lung changes" that, at least in part, contributed to Black's disabling lung carcinoma (*id.* at D7-D8). Furthermore, the ALJ held that petitioner Todd Shipyards, Black's last employer covered by the LHWCA, was "totally responsible for the payment of all benefits to which the claimant is entitled" (*id.* at D12). Finally, the ALJ found that Black's "time of injury," which determines the rate of compensation to be paid under 33 U.S.C. 910, was December 1977, "the earliest date that he was first made aware of his occupational disease and its relationship to Todd employment" (Pet. App. D13-D14).

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[1] Black died in 1981 and his widow, Zella Black, now claims survivor's benefits (Pet. App. A8-A9).

4. Petitioners appealed to the Benefits Review Board, which affirmed the ruling of the ALJ in a per curiam decision (Pet. App. E2-E5). The three Board members also set forth individual views. Judges Kalaris and Miller agreed that petitioner Todd Shipyards was solely liable as the last covered employer (*id.* at E6-E8, E10), but disagreed concerning the time of injury for purposes of calculating the appropriate compensation rate. Judge Miller identified the time of injury "as the date that the occupational disease manifests itself through a loss of wage-earning capacity" (*id.* at E11). Judge Kalaris, relying on the Board's decision in *Dunn* v. *Todd Shipyards Corp.*, 13 Ben. Rev. Bd. Serv. (MB) 647 (1981), would have based Black's average weekly wage on his compensation rate "on the date of his last exposure to harmful stimuli" at petitioner Todd Shipyards (Pet. App. E9). Judge Smith concluded that Black was not eligible for LHWCA benefits because his last exposure to asbestos was during his employment with Boeing, an employer not covered by the LHWCA; Judge Smith, therefore, did not reach the time of injury issue (*id.* at E13, E25).

5. Petitioners sought judicial review of the Board's decision pursuant to 33 U.S.C. 921(c). The court of appeals affirmed the Board decision on all issues.[2]

The court of appeals first held that petitioner Todd Shipyards, Black's last employer covered by the LHWCA, was fully liable for Black's occupational disease (Pet. App. A11). "In a situation where two LHWCA employers may be responsible for a work-related injury or disease, the last

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[2]The court of appeals considered, sua sponte, the Board's authority to issue the decision in this case, noting that no two of the three Board members had concurred in a resolution of the time of injury issue, as required by 33 U.S.C. 921(b)(2). The court determined that the Board's per curiam decision, although lacking precedential value, constituted a reviewable final order. See Pet. App. A25-A31. None of the parties in this case has argued that the Board lacked authority to issue its decision in this case.

employer is completely liable" (*id.* at A12 (footnote omitted), citing *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 137, 145 (2d Cir. 1955), cert. denied, 350 U.S. 913 (1955)). The court noted that Todd Shipyards, as the last covered employer, was liable under the LHWCA notwithstanding Black's subsequent non-covered employment with Boeing. "Congress did not intend that a company covered by the LHWCA should escape its legal responsibilities because a subsequent employer not covered by the Act also contributed to the occupational disease" (Pet. App. A14-A15).

The court of appeals found that its decision fulfilled the legislative purpose underlying the LHWCA. "Congress' goal was to assure full compensation to industrially injured workers and to remove from LHWCA claimants the burden and delay inherent in litigating complex issues of proportionate liability" (Pet. App. A21-A22). Whether Black can also recover state workers' compensation based on his exposure to asbestos at Boeing was found to be irrelevant to petitioner Todd Shipyards' liability under the LHWCA, because "the LHWCA establishes a discrete compensation system independent of similar state programs" (*id.* at A20 n.5). The court noted, however, that its decision accords with general workers' compensation law, which holds the last employer covered by a state workers' compensation statute fully liable for an injury if the last employer contributing to the injury is located in another state beyond the jurisdictional reach of the court in which the claimant is seeking a compensation order (*id.* at A15-A19).

The court of appeals next held that Black's compensation should be based on his earnings at the time his occupational disease manifested itself in 1977 rather than on his earnings during his last full year of employment at petitioner Todd Shipyards in 1944 (Pet. App. A24). The court of appeals rejected the Board's contrary conclusion in *Dunn* v. *Todd*

Shipyards Corp., supra, reasoning that the purpose of the LHWCA — "to compensate workers for the loss of wage-earning capacity resulting from occupational injuries and diseases" — can be accomplished in the case of a disease with a long latency period only by equating the time of injury with the time the effects of the disease are objectively realized and thus affect wage-earning capacity (Pet. App. A35). The court found that a manifestation rule comports with "a realistic definition" of "injury" as that term occurs in other sections of the LHWCA and in common usage (*id.* at A38-A39):

> Asbestosis begins when asbestos fibers become embedded in the lungs. The average person, however, would not consider himself "injured" merely because the fibers were embedded in his lung * * *. Rather, the average person would consider himself injured when the asbestos fibers finally cause asbestosis — a process that can take much longer than 20 years.

The court concluded that equating "time of injury" with time of exposure would be "completely contrary to the purposes of the Act" because it "affords compensation on the basis of the wages received when exposure occurred * * * even when the disease ultimately caused by the exposure does not disable the worker until decades later" (*id.* at A36).

ARGUMENT

The court of appeals correctly found that the time of a claimant's injury, for the purpose of calculating a compensation rate in an occupational disease case, is the time at which the disease manifests itself. The court of appeals also correctly held that the last employer covered by the LHWCA to expose a claimant to injurious stimuli must bear full liability for any resulting occupational disease. Both of these conclusions are in accord with all relevant

decisions of this Court and other courts of appeals and do not warrant further review.

1. The decision of the court of appeals, equating the "time of injury" of a LHWCA claimant suffering from an occupational disease with the time at which the disease manifests itself, is in full agreement with the decisions of other courts of appeals defining "injury" in occupational disease cases under the LHWCA and promotes the basic purposes of the Act.[3] Under the LHWCA, the courts have uniformly held that an occupational disease is an injury only when it manifests itself. As Judge Learned Hand explained in *Grain Handling Co.* v. *Sweeney,* 102 F.2d 464, 466 (2d Cir.), cert. denied, 308 U.S. 570 (1939), an occupational disease becomes an "injury" under the LHWCA at the point of manifestation: "[t]he statute is not concerned with pathology, but with industry disability; and a disease is no disease until it manifests itself."[4] See also

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[3]Contrary to petitioners' assertions (Pet. 6-7), the decision of the court of appeals does not conflict with any decision of this Court. In *Pillsbury* v. *United Engineering Co.*, 342 U.S. 197 (1952), this Court held that a LHWCA claimant who "was immediately aware of his injury, received medical treatment, and suffered continuous pain" had to file a claim within one year of the injury, as was required by 33 U.S.C. 913(a) prior to its amendment in 1972. In finding that "injury" may precede "disability," this Court stressed that "[w]e are not here dealing with a latent injury or an occupational disease" (342 U.S. at 199). *U.S. Industries* v. *Director, OWCP,* 455 U.S. 608 (1982), is also inapposite; this Court found that an "attack of pain" that neither occurred during working hours nor constituted "a manifestation of an earlier [work-related] injury" was not an injury that arose in the course of employment (*id.* at 615-616). In this case, petitioners do not dispute that respondent Black's disease arose out of his employment with Todd Shipyards.

[4]Petitioners incorrectly maintain (Pet. 8-9) that the decision of the court of appeals impermissibly relies on "recent trends" to expand LHWCA coverage. In fact, the court of appeals explicitly relied on *Grain Handling Co.* v. *Sweeney, supra,* which was decided more than 40 years ago (Pet. App. A39-A40). Of course, the etiologies of many occupational diseases, such as those caused by exposure to asbestos,

Cadwallader v. *Sholl*, 196 F.2d 14, 15 (D.C. Cir.), cert. denied, 343 U.S. 966 (1952) ("any attack [of an occupational disease], whether an initial one or one following a symptom-free period, if it arises naturally out of the employment is an 'injury' " as that term is defined in 33 U.S.C. 902(2)); *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 137, 142 (2d Cir.), cert. denied, 350 U.S. 913 (1955) ("injury" in occupational disease case for purposes of pre-1972 LHWCA statute of limitations is the "date * * * upon which the cumulative effects of exposure manifest themselves"). Accord, *Stancil* v. *Massey*, 436 F.2d 274, 277 (D.C. Cir. 1970); *Aerojet-General Shipyards, Inc.* v. *O'Keeffe*, 413 F.2d 793, 795-796 (5th Cir. 1969).[5]

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have achieved greater medical recognition in recent years; thus, the growth of judicial decisions involving personal injuries caused by asbestos exposure is necessarily recent. This recent trend in judicial decision, referred to by the court of appeals, is quite different from the economic trend that this Court refused to use as the basis for modifying a long-standing interpretation of the unambiguous statutory term "wages" in *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 11.

[5]Petitioners maintain (Pet. 7) that the court of appeals' decision with respect to LHWCA coverage under 33 U.S.C. 903(a) implicitly recognizes that Black's "injury" occurred at the time of his exposure to asbestos. Petitioner's assertion is without merit.

The LHWCA provides coverage for the "disability or death [of a covered employee that] results from an injury occurring upon the navigable waters of the United States" (33 U.S.C. 903(a)). However, an occupational disease injury, as defined in 33 U.S.C. 902(2), includes two elements: the claimant must have a disease and the disease must "arise[] naturally out of [his] employment." Therefore, if 33 U.S.C. 902(2) and 903(a) are read together, it is clear that the LHWCA provides coverage for an occupational disease arising out of *employment* that occurred upon the navigable waters. Thus, the court of appeals correctly concluded that Black's disease is covered under 33 U.S.C. 903(a) because "Black was exposed to the dangerous asbestos while being employed at Todd upon navigable waters" (Pet. App. A12); that conclusion in no way suggests that Black's "injury," as defined by 33 U.S.C. 902(2), occurred the first time he inhaled asbestos on the job. See *Andras* v. *Donovan*, 414 F.2d 241, 243 (5th Cir. 1969) ("an injury occurring on land may be compensable * * * if its cause originated on the water").

This Court has reached the same result in an analogous context. In *Urie* v. *Thompson,* 337 U.S. 163(1949), this Court concluded that a worker suffering from an occupational disease such as silicosis is "injured," and thus has a cause of action under the Federal Employers' Liability Act, " 'only when the accumulated effects of the deleterious substance manifest themselves' " (*id.* at 170 (quoting *Associated Indemnity Corp.* v. *Industrial Accident Commission,* 124 Cal. App. 378, 381, 12 P.2d 1075, 1076 (1932))). The Court therefore refused to find that the claimant's cause of action was barred by the statute of limitations.[6]

The conclusion that one suffering from a disease with a long latency period is not "injured" until the effects of the disease appear reflects the compensatory purpose of the LHWCA in a manner that "avoids harsh and incongruous results." See generally *Voris* v. *Eikel,* 346 U.S. 328, 333

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[6]The statute of limitations applicable to LHWCA claims, 33 U.S.C. 913(a), was amended in 1972 to provide that a claim must be filed "within one year after the injury or death. * * * The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." Petitioners erroneously suggest (Pet. 9) that this amendment demonstrates that Congress could not have meant "time of injury" to mean date of manifestation, because the amendment would have been meaningless. The amendment, however, does not address the time of injury itself, but rather the causal link between the injury and the employment. As the court of appeals correctly noted, "[a] disease may manifest itself long before the employee becomes aware of its cause" (Pet. App. A43 n.12). In fact, respondent Black's injury (the disease) manifested itself in May 1977, but he did not learn that he was suffering from a disease arising out of his employment until December 1977 (*id.* at A5, D4). Indeed, as the court of appeals noted (*id.* A42-A43 n.12), the statute of limitations would not operate equitably if "injury" were synonymous with "exposure" in an occupational disease case: "claimant Black was certainly aware from his first days on the job of his exposure to asbestos fibers * * * and its relationship to his employment. [If the LHWCA statute of limitations operated as petitioners suggest, the 1972] amendment would not * * * toll the statute for Black and his suit would be barred."

(1953). Compensation awards are intended to replace, in part, the actual earning capacity of the injured employee.[7] See, *e.g., Palacios* v. *Campbell Industries,* 633 F.2d 840, 843 (9th Cir. 1980); *Tri-State Terminals, Inc.* v. *Jesse,* 596 F.2d 752, 756 (7th Cir. 1979). Earning capacity includes the claimant's "ability, willingness and opportunity to work" that are thwarted by the disabling injury. *Tri-State Terminals, Inc.* v. *Jesse,* 596 F.2d at 757. This earning capacity has realistic meaning to the employee disabled by an occupational disease only if measured at the time the disease manifests itself, rather than at a perhaps distant past time when exposure occurred. See also H.R. Rep. 92-1441, 92d Cong., 2d Sess. 1 (1972) (in enacting 33 U.S.C. 910(h) in 1972, Congress explicitly recognized that the purpose of the LHWCA is "to provide adequate income replacement for disabled workers covered under this law").[8]

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[7] *Potomac Electric Power Co.* v. *Director, OWCP,* 449 U.S. 268, 281 (1980), cited by petitioners (Pet. 12-13), merely establishes that recovery under this "remedial" statute does not "provide complete compensation for the wage earner's economic loss." Rather, recovery is generally limited to two-thirds of the claimant's average weekly wage. See 33 U.S.C. 908, 909.

[8] Petitioners assert (Pet. 10-11) that the legislative history of the LHWCA supports their contention that the time of injury in an occupational disease case is the time of exposure to injurious stimuli. In fact, the legislative history cited by petitioners establishes, to the contrary, that Congress recognized that accident, injury, and disability do not always occur simultaneously. In providing that the average weekly wage be based on wages earned at the time of the "injury" rather than the "accident" and that the statute of limitations run from the date of the "injury" rather than the "accident," Congress recognized a distinction in both traumatic accident and occupational disease cases between the employment event ("accident") and the resulting physical harm ("injury"). See *To Provide Compensation for Employees Injured and Dependants of Employees Killed in Certain Maritime Employments: Hearing on H.R. 9498 Before the House Comm. on the Judiciary,* 69th Cong., 1st Sess. 192 (1926) [hereinafter cited as *House Hearing*]. The

2. The court of appeals also correctly held petitioner Todd Shipyards solely liable for the full amount of compensation due respondent Black under the LHWCA. Contrary to petitioners' assertions (Pet. 14-17), this holding is in accord with the well-settled principle, applicable if two or more employers covered by the LHWCA are responsible for an occupational disease, that "the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award." *Travelers Insurance Co.* v. *Cardillo,* 225 F.2d at 145. Accord, *Cordero* v. *Triple A Machine Shop,* 580 F.2d 1331, 1336 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979).

It is undisputed that Black's lung disease and disability arose, at least in part, out of extensive exposure to asbestos while engaged in covered employment with Todd Shipyards. Petitioners contend that Todd should be absolved of liability, however, because Black was also exposed to asbestos while later employed at Boeing, in non-covered work. But, the "last employer" principle enunciated in *Travelers Insurance Co.* v. *Cardillo, supra,* has never been interpreted as petitioners suggest. The purpose of the principle is

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decision below merely gives form to this congressionally recognized distinction.

Moreover, petitioners' reliance (Pet. 9) on the Board's decision in *Dunn* v. *Todd Shipyards Corp., supra,* is misplaced. The Benefits Review Board is not a policymaking agency and its interpretations of the LHWCA are accorded no special deference. *Potomac Electric Power Co.* v. *Director, OWCP,* 449 U.S. 268, 278 n.18 (1980). Furthermore, *Dunn* represents a reversal of the Board's prior view that the time of injury in an occupational disease case is the time at which the disease manifests itself. See, *e.g., Stark* v. *Bethlehem Steel Corp.,* 6 Ben. Rev. Bd. Serv. (MB) 600, 603 (1977), reaffirmed on reconsideration, 10 Ben. Rev. Bd. Serv. (MB) 350 (1979), 15 Ben. Rev. Bd. Ser. 288 (1983).

to assess liability equitably among successive employers who could be held liable under the Act, not to absolve an employer who could otherwise be held liable. It replaces the "exceedingly difficult, if not practically impossible" task of "correlat[ing] the progression of the disease with specific points in time or specific industrial experiences" with a rule of administrative simplicity that insures that claimants will receive the compensation due them. *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d at 144.

Thus, when an employee is exposed to injurious stimuli while engaged in covered employment, the employer remains liable for the disability arising from the ensuing disease even though the employee is more recently (and for longer periods) exposed to injurious stimuli while engaged in non-covered work for that employer (*Fulks* v. *Avondale Shipyards, Inc.*, 10 Ben. Rev. Bd. Serv. (MB) 340 (1979), aff'd, 637 F.2d 1008 (5th Cir.), cert. denied, 454 U.S. 1080 (1981)). As the Fifth Circuit noted, "even if the injurious stimuli were encountered during employment both on navigable waters and in an area not covered by the Act, the entire disability was nevertheless compensable" under the LHWCA (637 F.2d at 1012).

Similarly, courts considering an analogous question under state workers' compensation laws have commonly held the last employer covered by the state law fully liable regardless of whether the employee was later exposed to injurious stimuli by an out-of-state employer. See, *e.g.*, *Garner* v. *Vanadium Corp. of America*, 194 Colo. 358, 572 P.2d 1205 (1977); *Smith* v. *Lawrence Baking Co.*, 370 Mich. 169, 121 N.W.2d 684 (1963); *Hamilton* v. *S.A. Healy Co.*, 14 A. D. 2d 364, 221 N.Y.S.2d 325 (1961). Such principles of liability assessment recognize that "the overriding legislative purpose" in enacting a workers' compensation statute, *i.e.*, that an "industrial illness claim be compensated," supersedes the "secondary consideration" of "which

of several employers should pay a particular claim" (*Garner* v. *Vanadium Corp. of America,* 194 Colo. at 361, 572 P.2d at 1207). Like the rule assigning full liability to only one of several joint tortfeasors, the last employer principle recognizes that "the law favors a prompt, efficient remedy for the injured person" (*ibid.*).[9]

In sum, the court of appeals was entirely correct in holding that respondent Black's subsequent exposure to injurious stimuli while engaged in non-covered employment does not absolve petitioner Todd Shipyards of full liability for compensation as the last (and only) employer covered by the LHWCA to expose Black to injurious stimuli. See also *Green* v. *Newport News Shipbuilding & Dry Dock Company,* 13 Ben. Rev. Bd. Serv. (MB) 562 (1981), vacated

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[9]Petitioners suggest (Pet. 15-16) that the court of appeals has undermined the equitable basis underlying the last employer principle, *i.e.*, that "all employers will be the last employer a proportionate share of the time" (*Cordero* v. *Triple A Machine Shop,* 580 F.2d at 1336). In fact, the court of appeals' decision does not disturb the equitable foundation of the rule. Each *covered* employer will continue to be the last responsible employer a proportionate share of the time. As one state court noted in adopting a similar interpretation of the rule, "[i]f *prior* exposure outside [the state] may be disregarded in assigning liability to the *last* employer, we see no logical reason why later exposure while outside [the state] may not also be disregarded" (*Garner* v. *Vanadium Corp. of America,* 194 Colo. at 361, 572 P.2d at 1207 (emphasis in original)). Moreover, because the LHWCA imposes total liability on any covered employer that contributes to the claimant's injury (see note 10, *infra*), the last employer principle prevents a claimant from recovering in full from more than one covered employer.

and remanded on other grounds, 688 F.2d 833 (4th Cir. 1982).[10]

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[10]Petitioners alternatively suggest (Pet. 18-19) that liability should be apportioned between Boeing and petitioner Todd Shipyards. This suggestion is unsupportable. The LHWCA does not authorize apportionment of liability between two covered employers (*Cordero* v. *Triple A Machine Shop*, 580 F.2d at 1336), or between a covered and a non-covered employer. In fact, Congress, in enacting the LHWCA, specifically rejected a proposal to provide for apportionment of liability between covered employers (*House Hearing* 72-75). Cf. *Independent Stevedore Co.* v. *O'Leary*, 357 F.2d 812, 815 (9th Cir. 1966) (employer totally liable for disability caused by work-related aggravation of pre-existing injury). *United Painters & Decorators* v. *Britton*, 301 F.2d 560, 562 (D.C. Cir. 1962), cited by petitioners (Pet. 18-19), is inapposite, because in apportioning liability between two covered employers responsible for *separate* injuries, the court cautioned that it was not dealing with an occupational disease. Nor is there any force to petitioners' suggestion that the decision below will encourage non-maritime employers to "contribute with impunity to the exposure of ex-maritime employees to injurious stimuli knowing they will never become the last responsible employer" (Pet. 16). Non-maritime employers would hardly be so foolhardy, in light of their probable liability for such exposure under state worker's compensation schemes.

Finally, whether Black is eligible to receive state workers' compensation based on his exposure to asbestos at Boeing is not relevant to his eligibility for LHWCA compensation. In enacting the LHWCA, "Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 117 (1962) (footnote omitted). See, *e.g.*, *United Brands Company* v. *Melson*, 594 F.2d 1068, 1075 (5th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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